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Supreme Court, U.S.
FILED
OCT 27 1997
CLERK

No. 97-563

In The

Supreme Court of the United States

October Term, 1997

MARC FORMAN, GUY VANDERPOOL, AND WILLIAM DIX,

Petitioners,

vs.

CITY OF RICHMOND, INDIANA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COPY

PARTIES TO THE PROCEEDING[1]

This Petitioners are Marc Forman, Guy Vanderpool and William Dix.

The Respondents are the Richmond Police Department and Mark Smith, Individually and as an officer with the Richmond Police Department.

Although the City of Richmond, Indiana, is listed in the caption as a party to the case, it was dismissed from this case by order of the District Court. No appeal challenging the dismissal of the City of Richmond by the District Court was considered by the Seventh Circuit Court of Appeals.

The Brief in Opposition is filed on behalf of the Richmond Police Department and Mark Smith, Individually and as an officer with the Richmond Police Department.

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The names of the parties to the proceeding in the Seventh Circuit, whose judgment is sought to be reviewed, do not appear in the caption and do not appear within the Petition for Writ of Certiorari. In compliance with Supreme Court Rule 14(b), the names are therefore provided herein.

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PRIOR COURT OPINIONS

Respondents request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Seventh Circuit (hereinafter "Seventh Circuit"). The opinion of the Seventh Circuit has been reported and appears at 104 F.3d 950 (7th Cir. 1997) and is reproduced as Appendix "A" and contained within the Petition for Writ of Certiorari. The Order on Cross Motions for Summary Judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division (hereinafter "District Court") has not been published. The unpublished Order of the District Court is reproduced verbatim herein at Appendix "A". The opinion of the Indiana Supreme Court has been reported and appears at 662 N.E.2d 929 (Ind. 1996) and is reproduced verbatim herein at Appendix "B".

STATEMENT OF JURISDICTION

Mark Smith does not contest this Court's jurisdiction over the claims asserted against him. The jurisdiction of the Court over the Respondent, Richmond Police Department, is disputed, because the Petitioner does not raise as error the Seventh Circuit Court's decision affirming the District Court's Order granting summary judgment in its favor.

CONSTITUTIONAL PROVISIONS[2]

The constitutional provisions here involved are the Fourth and Fourteenth Amendments to the United States Constitution and are set out verbatim herein as Appendices "C" and "D".

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Constitutional provisions at issue do not appear within the Petition for Writ of Certiorari. In compliance with Supreme Court Rule 14(f), these constitutional provisions are included herein.

STATUTORY PROVISIONS[3]

The statutory provision here involved is 42 U.S.C. § 1983 and is set out verbatim herein as Appendix "E".

3

The statutory provision here involved does not appear within the Petition for Writ of Certiorari. In compliance with Supreme Court Rule 14(f), the relevant statutory provision is included herein.

STATEMENT OF THE CASE

The Respondents respectfully oppose the Petition for Writ of Certiorari (hereinafter "the Petition") which is replete with numerous misstatements of both the facts and the applicable law in this case.

A. Course of Proceedings and Disposition of the Case Below.

In their Complaint and Amended Complaint, Marc Forman (hereinafter "Forman"), William Dix (hereinafter "Dix"), and Guy Vanderpool (hereinafter "Vanderpool") contended that Mark Smith, a Lieutenant on the Richmond, Indiana Police Department, the Wayne County, Indiana Prosecutor Terry O'Maley ("Prosecutor O'Maley"), the City of Richmond, Indiana and "John Does 1-50" violated 42 U.S.C. §§ 1983 and 1985 by depriving them of their rights under the United States Constitution, the Indiana Constitution, and various statutory provisions. All three plaintiffs brought state law claims of false arrest and false imprisonment, and Dix added a state claim for defamation.

The district court dismissed the claims against Prosecutor O'Maley and the City of Richmond in separate orders issued on October 6, 1995. The remaining parties filed cross motions for summary judgement in January and February of 1995. The district court granted Lt. Smith's and the Richmond Police Department's motion and denied the Plaintiffs' motion. With regard to the claims against Lt. Smith, the court held that Lt. Smith either did not violate the Plaintiffs' constitutional rights or that he was entitled to qualified immunity for any constitutional or state law violations that did occur. Next, the court found that Plaintiffs failed to establish that the Richmond Police Department violated their constitutional rights through some official policy or custom. Finally, the court ruled in favor of the unnamed police officers ("John Does 1-50") because Plaintiffs failed to identify them within the applicable two-year statute of limitations. The court also noted that these defendants would have been entitled to the same qualified immunity as Lt. Smith.

Forman, Dix and Vanderpool subsequently appealed the District Court's Order to the Seventh Circuit. The only issues preserved for appeal were whether Lt. Smith, the Richmond Police Department, or any other officers from the department violated 42 U.S.C. § 1983 by depriving them of their constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution. Prosecutor O'Maley and the City of Richmond were not parties to the appeal. No effort on behalf of Forman, Dix or Vanderpool was exerted to challenge the district court orders dismissing those parties.

The Seventh Circuit upheld the District Court's determination that there were no genuine issues of material fact which precluded the District Court from granting summary judgment in favor of Lt. Smith and the Richmond Police Department on the issues of qualified immunity. Specifically, with regard to the claims asserted by Forman against Lt. Smith, the Seventh Circuit found that the District Court correctly determined that Lt. Smith was entitled to qualified immunity. The Seventh Circuit also determined that the District Court correctly found that Dix's claims were without merit and that Lt. Smith was clearly entitled to qualified immunity with regard to them. In addition, the Seventh Circuit found that the District Court correctly concluded that the claims asserted by Vanderpool were not supported by any evidence and that Lt. Smith also had qualified immunity under those circumstances. Finally, the Seventh Circuit summarily affirmed the District Court's entry of summary judgment in favor of the Richmond Police Department regarding the § 1983 claims. Like the District Court, the Seventh Circuit noted that Forman, Dix and Vanderpool failed to assert that any constitutional deprivation arose as a result of an official policy or custom of the Richmond Police Department.

B. Correction of Misstatements in the Petition.

The opinions of the Seventh Circuit and the District Court correctly set forth the facts of this case and Respondents respectfully direct the Court's attention to the lower courts' opinions and orders. Pursuant to United States Supreme Court Rule 15.2, however, Respondents are obligated to bring to the Court's attention any

misstatements made in the Petition. The Respondents observe that the Petition is riddled with inaccuracy and misstatements. Petitioners' also fail to accurately cite several cases which they believe support their Petition.[4] In addition, the Petition lacks sufficient clarity to allow Respondents to enjoy a ready and adequate understanding of the points and arguments which Petitioners' ask this Court to consider. Because of these several deficiencies, Respondents must undertake the arduous task of first "re-constructing" Petitioners' Statement of the Case in order to comply with the requirements of Rule 15.2.

First, the Petition erroneously portrays the findings of the United States Court of Appeals for the Seventh Circuit. Specifically, the Petition mischaracterizes the Seventh Circuit holding by claiming that the court determined that the warrantless search of the Richmond Plaza Bingo Center (hereinafter "Bingo Center") and subsequent seizure on April 3, 1992, was "proper." More accurately, the Seventh Circuit found that Lt. Smith was "entitled to qualified immunity" because his actions were "objectively reasonable" in light of the facts and law known to him at that time.

Overall, the Petition attempts to create factual disputes where none exist by making conclusory statements. The Petitioners' description of the events of April 3, 1992, leave the Respondents unsure of the Petitioners' point or points they ask this Court to review. Nevertheless, a complete accounting of the facts demonstrates that Lt. Smith, an investigator with a special unit of the Richmond Police

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[4] The Petition lists the following incorrect citations:
Celotex Corp. v. Catrett, 47 U.S. 317 (1986), correctly cited *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Pierson v. Ray, 396 U.S. 547 (1967), correctly cited *Pierson v. Ray*, 386 U.S. 547 (1967).

Illinois v. Rodriguez, 110 S.Ct. 319 (1990), correctly cited *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793 (1990).

Department, received information that the Bingo Center was operating under an invalid gambling permit. After learning this information, Lt. Smith drove to the Bingo Center where he observed Petitioner Guy Vanderpool suddenly move to shut the door to a room at the rear of the Bingo Center. Lt. Smith approached Vanderpool and asked to speak with the operator of the Bingo Center. Vanderpool directed Lt. Smith to Luther Ogletree (hereinafter "Ogletree"). Ogletree identified himself to Lt. Smith as the operator of the Bingo Center. Lt. Smith requested Ogletree to produce a valid gambling permit, however, Ogletree was unable to comply with that request.

Lt. Smith then contacted the Wayne County Prosecuting Attorney, Terry O'Maley, for instructions and was advised to obtain a consent to search the premises from Ogletree. Ogletree was read the Consent to Search form, acknowledged his understanding of the form, affixed his signature to it and stated that he had nothing to hide.

During the search of the Bingo Center premises, several thousand dollars in cash, records and documents regarding proceeds, check books and a hand gun were discovered. Also during the search, the officers encountered a locked door, which was the same door Lt. Smith witnessed being closed by Vanderpool. Without asking for a key, the officers removed the door from its hinges as Ogletree stood quietly by. Ogletree never requested a stop of the search nor did he make any attempt to either qualify or withdraw his written consent to search the premises.

The officers entered the room and discovered ten illegal gambling machines and ten stools.[5] At that time, Ogletree disclaimed ownership of the machines, produced a copy of a written lease and stated that the room had been rented to Petitioner Marc Forman. Shortly thereafter, Vanderpool provided Lt. Smith with a set of keys, one of

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The Petition appears to question the illegality of the gambling machines and inappropriately places before this Court a question which was not necessary to the decision below.

which opened the lock to the door which was removed from its hinges and another which opened the video gambling machines.

Although the Petition accurately states that Lt. Smith and the Richmond Police officers entered a locked room at the Bingo Center by removing the door from its hinges, the Petition fails to mention that the Seventh Circuit found that the entry was made while conducting the consensual, yet warrantless, search of the premises. Upon the advice of Prosecutor O'Maley, no individuals were arrested incidental to the search of the Bingo Center on April 3, 1992. The Petition's characterization of Lt. Smith's actions as well as its conclusory assertions regarding Lt. Smith and his decisions surrounding access to the locked room are not only misplaced but also deficient.

The Petition accurately reflects that state court criminal charges were asserted against Marc Forman; however, the Petition incorrectly states that the Indiana Supreme Court determined that Lt. Smith failed to act as a reasonable police officer in *State of Indiana v. Marc Forman*, 662 N.E.2d 929 (Ind. 1996). This misstatement of the findings of the Indiana Supreme Court should not mislead this tribunal. Evaluating the merit of Forman's motion to suppress based upon the challenged validity of the search of the locked room, the Indiana Supreme Court held, notwithstanding Ogletree's consent to search the Bingo Center, that, "Because the defendant (Forman) had a reasonable expectation of privacy in the leased (locked) room, there was no valid consent to search the premises, and no valid exception to the warrant requirement was claimed, the warrantless search of the leased premises was unconstitutional and the trial court's motion to suppress was appropriate." *State of Indiana v. Marc Forman*, 662 N.E.2d 929, 934 (Ind. 1996).

The Petition's portrayal of the Seventh Circuit's rationale for its decision conferring qualified immunity upon Lt. Smith is based upon similar distortions. The Petitioners describe the rational of the Seventh Circuit's decision as conferring qualified immunity because there was "no [then] prescribed duty to ask for a key." By the use of such a description, Petitioners fail to provide this Court with an accurate statement of the lower court's ruling. The Seventh Circuit determined

there were no genuine issues of material fact which prevented the district court from granting summary judgment in favor of Lt. Smith and the Richmond Police Department. The Seventh Circuit further found that the District Court correctly determined that Lt. Smith acted in an objectively reasonable manner in conducting the search of the Bingo Center and in arresting Marc Forman and that he was therefore entitled to qualified immunity, as a matter of law, for alleged violations of 42 U.S.C. § 1983.

Regarding Forman's unreasonable search and seizure claim, the Seventh Circuit initially addressed the issue of whether there were clearly established constitutional standards governing Lt. Smith's acts of removing the hinges to the door of a locked room as well as his subsequent entry and search of the locked room on the premises of an area to which a consensual search has been authorized. After an examination of the precedent available to guide a police officer's conduct in April 1992, the court concluded that the constitutional standards governing the scope of consensual searches were not clearly established and that it was not clear, at that time, that Lt. Smith should have asked Ogletree for a key to unlock the room.

Regarding Forman's warrantless arrest claim, the Seventh Circuit concluded that it was unnecessary to determine whether or not Lt. Smith participated in the warrantless arrest. The Seventh Circuit reasoned that if Lt. Smith did not participate in the alleged constitutional violation, then he could not be held liable under § 1983. Nevertheless, the facts demonstrated that, at the time of the arrest, Lt. Smith had probable cause to believe Forman had committed a felony because of his intimate involvement in owning or operating the gambling machines and placing them in the Bingo Center. The Seventh Circuit concluded that Lt. Smith was entitled to qualified immunity because his actions were objectively reasonable based upon the clearly established law and information he possessed at the time of the arrest.

The Seventh Circuit similarly rejected Dix's claims based upon his warrantless arrest, because Lt. Smith had probable cause for the arrest and since Dix was convicted for the underlying conduct leading to the arrest barring recovery under § 1983. The Petition's assertions

regarding Dix and the observations made by Lt. Smith are incomplete because they exclude the fact that, on two occasions, Dix was seen by Lt. Smith in the Bingo Center, which was operated without a valid gaming permit and in violation of Indiana law. In fact, Dix was seen in the Bingo Center office counting the proceedings and making records of an evening's bingo game. The Seventh Circuit noted that even if there was a genuine issue of material fact regarding whether or not probable cause existed for the arrest, that, under those circumstances, Lt. Smith was entitled to qualified immunity.

Vanderpool's claims based upon the lack of probable cause for his arrest pursuant to a warrant were also rejected. The Seventh Circuit found that Vanderpool's bald assertions, without more, failed to demonstrate that Lt. Smith knowingly or intentionally included a false statement within the probable cause affidavit or that he included material in the affidavit with reckless disregard for its truth. The Petition does not mention that Vanderpool was seen closing the door to the room containing illegal gambling machines, that he supervised use of those machines and made pay outs to customers, or that he possessed the keys to the room containing the machines. Under those circumstances, the Seventh Circuit acknowledged that Lt. Smith was entitled to qualified immunity for his actions related to the Vanderpool arrest.

Finally, the Petition erroneously characterizes information contained within the record regarding Lt. Smith, specifically the reference to "credibility problems." The Seventh Circuit rejected those same allegations and noted that the Plaintiffs had failed to present any evidence which undermined or served to question Lt. Smith's credibility. No new evidence is set forth in the Petition to support this continued assertion.

Reasons for Denying the Petition for Writ of Certiorari

THERE IS NO REASON FOR THIS COURT TO CONSIDER THE CONSTITUTIONAL ISSUES PRESENTED, BECAUSE THE PETITION DOES NOT RAISE ANY SUBSTANTIAL QUESTION FOR REVIEW.

A. The Petition Does Not Ask This Court To Settle Issues of Law.

The question presented for review in the Petition does not reflect any issues of law decided by the lower courts. The Petition does not reflect a conflict or division on a matter of law between the circuits. The Seventh Circuit found that conferring qualified immunity upon the Respondents was appropriate under the circumstances and upheld the district court's ruling. The Petition's factbound assertion that the courts below erroneously determined that the Respondents were entitled to qualified immunity are merely an attempt to create factual disputes where none exist and does not warrant review by this Court. The Seventh Circuit found that the "factual disputes" raised by Forman, Dix and Vanderpool were without merit and were not pivotal in the court's decision making. Additionally, the Petition fails to offer any new proof or evidence why the Respondents should not be entitled to qualified immunity. Finally, the point of law upon which the Seventh Circuit decided this case was not raised as error by Petitioners.

This Court has previously stated, "A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), *quoting Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949), *and superseded by statute on other grounds as stated in Haney v. Timesavers, Inc.*, 1993 U.S. Dist LEXIS 14646 (D. Or. 1993).

The Petition is merely an attempt at yet another review of the facts in this case. Although the Petition makes mention of *Illinois v. Rodriguez*, 497 U.S. 177 (1990) and *Schneckloth v. Bustamonte*, 412

U.S. 218 (1973), it is completely bereft of any sound argument that those precedents were misapplied. The opinion of the Seventh Circuit includes and did not in any manner ignore those precedents. Nevertheless, both the district and appellate courts agreed that conferring qualified immunity was appropriate when interpreting these cases in conjunction with additional existing case law. Respondents urge that no further review of the qualified immunity issue is warranted, because the Petition merely seeks review of unsupported factual allegations and not of issues of law.

B. The Petition Does Not Demonstrate That Summary Judgment Was Erroneously Entered on Behalf of the Respondents.

The Petition appears to claim that the Seventh Circuit erroneously entered summary judgment on behalf of the Respondents, because there was a genuine issue of material fact and therefore the Respondents were not entitled to summary judgment as a matter of law. Although the Petition includes mention of this Court's standard for summary judgment as established in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Petition does not demonstrate any manner in which the Seventh Circuit's ruling was made contrary to this standard. The Petition also ignores the well established legal principal that qualified immunity is generally a question of law for the court to resolve and that summary judgment is the proper posture from which to decide this objective legal question. *Hunter v. Bryant*, 502 U.S. 224 (1991); *Rakovich v. Wade*, 850 F.2d 1180, 1201-02, 1204-05 (7th Cir. 1988), *cert. den.*, 488 U.S. 968.

The issues of fact alluded to by the Petition were found by the Seventh Circuit to be insubstantial and thereby insufficient to prevent an entry of summary judgment being granted in favor of Respondents. For example, in its analysis, the Court explicitly stated that regardless of whether Lt. Smith participated in the arrest of Forman, whether Lt. Smith had probable cause to arrest Dix and whether the affidavit was sufficient to support the probable cause necessary for the arrest of Vanderpool, Lt. Smith was entitled to qualified immunity under the

circumstances surrounding those fact sensitive events. These issues do not encompass the entirety of the claims against the Respondents, nevertheless, the Petition curiously directs this Court's attention to these factors as though they are in some manner dispositive of the summary judgment issue.

Additionally, the Petition appears to claim that summary judgment was entered in error and that the Respondents are somehow barred from entitlement to qualified immunity, because the initial search of the Bingo Center was found to be unconstitutional. The Petition misses the purpose of qualified immunity which is to give "'ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (*quoting Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986)). After a defendant pleads a defense of qualified immunity, "[o]n summary judgment, the judge appropriately may determine, not only the currently applicable law, but also whether that law was clearly established at the time the action occurred..." *Sigert v. Gilley*, 500 U.S. 226, 231-232 (1991)(*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In its analysis, a court should ask whether a defendant acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed after the fact. *See Hunter*, 502 U.S. at 228.

The Petition's conclusion, without more, that the actions of Lt. Smith were somehow "illegal and contrary to the Fourth Amendment" and were "patently unreasonable under the Fourth Amendment" lacks merit. Although difficult to discern, Petitioners appear to be arguing that an action which, in general, violates any constitutional provision, such as the Fourth Amendment, vis-a-vis, violates a "a clearly established right." In adopting this argument, Respondents believe that Petitioners fail to comprehend or appreciate the development of the doctrine qualified immunity.

This Court on several occasions has addressed the proper analytical framework for determining whether a plaintiff's allegations are sufficient to overcome a defendant's defense of qualified immunity. A government official may plead the affirmative defense of qualified

immunity in an action brought pursuant to 42 U.S.C. § 1983. *Gomez v. Toledo*, 446 U.S. 635 (1980). Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action assessed in light of the legal rules that were "clearly established" at the time it was taken. *Harlow v. Fitzgerald*, 457 US 800, 816 (1982). The government official will be immune from liability if the conduct alleged in the complaint did not violate "clearly established, statutory or constitutional rights of which a reasonable person would have known." *Harlow* at 818.

In *Anderson vs. Creïghton*, 483 U.S. 635 (1987) this Court squarely addressed and rejected the very argument which Petitioners seek to present for review. In *Anderson*, this Court stated:

> "The operation of this standard [objective legal reasonableness], however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties, by making it impossible for officials reasonably to anticipate when their conduct may give rise to liability for damages. It should not be

> surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful but it is to say that in the light of pre-existing law the unlawfulness must be apparent."

Id. at 638 and 639.

Respondents construe Petitioner Forman's argument to be identical to the argument previously made and rejected by this Court in *Anderson*. This Court has already considered and decided the issues presented by Petitioners. Because Petitioners have not presented any compelling factual or legal reason why those issues should be revisited, this Court should deny the Petition.

The Petition additionally includes citations to *Pierson v. Ray*, 386 U.S. 547 (1967) and *Juriss v. McGowan*, 957 F.2d 345 (7th Cir. 1992) without supporting argument or explanation. Respondents, assuming that these citations are included within the Petition to demonstrate that the contours of the rights violated were clearly established at the time of the violation, assert that such precedent does not support the Petition's claims.

Nevertheless, the inclusion of *Pierson* is perplexing. In that 1967 case, officers made a claim that they should not have been held liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid but which was later held to be unconstitutional. This Court determined that a police officer is not entitled to absolute but rather a qualified type of immunity for actions related to said forms of arrests. Respondents note that this case is not and has not ever been one of absolute immunity. The Seventh Circuit did not base its ruling on the issue of absolute immunity. Therefore, *Pierson* is clearly distinguishable from this case and it

provides little, if any, guidance in ascertaining the crux of the Petition's arguments or support for them.

The citation to *Juriss* also fails to support the Petition. In *Juriss*, the Court recognized that qualified immunity is inappropriate if a reasonable officer would have known that the "particular action at issue" was unlawful in light of the law in effect at the time of the activity. *Juriss*, 957 F.2d at 350. In *Juriss*, an officer who knowingly arrested an individual with a warrant he knew was not supported by probable cause was not entitled to qualified immunity. Respondents first contend that the facts of *Juriss* are clearly distinguishable from the instant action. Next, aside from allegations that arrests of the Petitioners were unsupported by probable cause, the evidence before the Seventh Circuit and that presented within the Petition is not convincing nor does it challenge the probable cause issue. Finally, the *Juriss* opinion, in and of itself, does not make it clear that any action taken by Lt. Smith did not conform with actions that would have been taken by an objectively reasonable police officer faced with the same or similar facts and circumstances.

C. The Petition Does Not Demonstrate the Existence of Any Confusion or Conflict in the Lower Courts Regarding the Issue of Qualified Immunity.

Respondents find it difficult to ascertain exactly what the Petition attempts to convey, and note, however, that if the Petition is intended to assert any conflict between the opinion of the Seventh Circuit and that of the Indiana Supreme Court, the argument is unfounded.

The Supreme Court of Indiana reversed an Indiana Court of Appeals decision [*Indiana v. Forman*, 649 N.E.2d 120 (Ind.App. 1995)] upholding Lt. Smith's search of the Bingo Center. The Indiana Supreme Court found that Forman had an expectation of privacy in the locked room and that if the police reasonably believed that Ogletree gave permission to search the locked room, the police simply would have asked Ogletree to unlock the door. *State v. Forman*, 662 N.E.2d 929 (Ind. 1996). The court ultimately concluded that there was sufficient

evidence to demonstrate that Ogletree did not validly consent to a search of the locked room to support the trial court's grant of Forman's Motion to Suppress. Despite its finding, the Indiana Supreme Court acknowledged that it was a "close call whether or not Ogletree had actual common authority." *Forman*, 662 N.E.2d at 932.

As noted by both the District Court and the Seventh Circuit, the differing opinions of the Indiana Court of Appeals and the Indiana Supreme Court illustrate the constitutional uncertainty regarding the standards governing consent to search issues. That two courts could approach this issue and reach different conclusions suggests that the governing law was far from "clearly established" at the time of Lt. Smith's search. In addition, the Seventh Circuit pointed to several other cases, each decided prior to the search in question, which demonstrated, at a minimum, that there was no clearly established law applicable to the search of a locked room in April of 1992. The Seventh Circuit also regarded Lt. Smith's conferences with the prosecuting attorney as providing insight into the "objective reasonableness" of the officer's actions. Finally, the Seventh Circuit directly addressed the potential dilemma created by the Indiana Supreme Court opinion and stated the following:

> "Although we find that Lt. Smith is entitled to qualified immunity, we do not dismiss the Indiana Supreme Court's concern about police officers removing the door from its hinges when they could have easily asked someone to unlock the door. Nevertheless, there was no clearly established precedent holding that the failure to seek a key for a locked room found on premises that could otherwise be lawfully searched would result in a violation of anyone's Fourth Amendment rights."

Forman v. Richmond Police Department, 104 F.3d 950, (7th Cir. 1997).

Despite the above, Petitioners continue to assert that opinion of the Indiana Supreme Court that the search was unconstitutional and therefore unreasonable is conclusive and binding upon courts considering Petitioners § 1983 claims. Petitioner's reliance upon this argument has been rejected by this Court in *Anderson* and as such is

unfounded. See *Anderson* at 633 and 644. Therefore, any conflict between the opinion of the Seventh Circuit and that of the Indiana Supreme Court is illusory.

CONCLUSION

Respondents respectfully submit that this case presents no issue of law or fact that justifies review by the United States Supreme Court. The Petitioners have had appropriate review at both the District Court and Appellate Court levels. The decisions of those courts were and are proper and the Petition for Writ of Certiorari should be denied.

App. "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARC FORMAN, WILLIAM DIX, JR., and GUY VANDERPOOL, Plaintiffs,	)
V.	)Cause IP94-340-CM/F
CITY OF RICHMOND, INDIANA, LT. MARK SMITH, RICHMOND POLICE DEPARTMENT, TERRY O'MALEY, WAYNE COUNTY PROSECUTOR, JOHN DOES 1-50, Defendants.	)

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The present case now comes before this Court on Cross Motions for Summary Judgment. On February 4, 1994, Plaintiffs Marc Forman ("Forman"), William Dix, Jr. ("Dix") and Guy Vanderpool ("Vanderpool") (collectively referred to as "Plaintiffs") filed this litigation, contending that their constitutional and statutory rights had been violated by Defendants Lt. Mark Smith ("Lt. Smith"); the Richmond Police Department ("Police Department"); the City of Richmond, Indiana ("Richmond"); Terry O'Maley ("O'Maley"); and other unidentified police officers. In two separate Orders dated October 6, 1995, this Court dismissed O'Maley and Richmond from the action. For reasons stated fully below, this Court now DENIES the Motion for Summary Judgment filed by the Plaintiffs and GRANTS the Motion for Summary Judgment filed by Lt. Smith and the Police Department. In addition, this Court GRANTS summary judgment in favor of the still-unidentified John Doe Defendants.

I. BACKGROUND

This action arises from a police raid of an unlicensed bingo operation located in Richmond, Indiana. On April 3, 1992, Lt. Smith received information that the operators of the Richmond Plaza Bingo Center ("Bingo Center") had been using a charity bingo permit belonging to the Muncie Fraternal Order of Police ("FOP") without proper authorization from that group. Desig. of Evid. Mater. in Supp. of Defs.' Mot. for Summ. J. (hereinafter "Defs. Ex.") , Ex. 1, p. 14. FOP President Max Pratt told Lt. Smith that he had removed a copy of the permit from the Bingo Center and that he did not believe there was a valid bingo permit on the premises. Defs. Ex. 1, pp. 17, 18; Def's Ex. 2, p. 74.

That same evening, Lt. Smith went to the Bingo Center to determine whether it was operating under a valid permit. Defs. Ex. 1, p. 13; Defs. Ex. 2, p. 76. When Lt. Smith entered the Bingo Center, Luther Ogletree ("Ogletree") informed the officer that he was the operator of the bingo game and the lessor of the Bingo Center premises. Defs. Ex. 3, pp. 58-59. Lt. Smith asked Ogletree to show him the Bingo Center's operating permit and accompanied him to the office located in the rear of the building, where Dix and another volunteer were counting money from the night's bingo operations. Defs. Ex. 1, p. 16; Defs. Ex. 2, pp. 79, 86. After Ogletree searched the office and failed to produce a permit, Lt. Smith informed him that the Bingo Center was operating illegally and called in additional officers from the Police Department to help shut down the building. Defs. Ex. 2, pp. 86, 88. Lt. Smith also called the Wayne County Prosecutor, Terry O'Maley ("O'Maley") to discuss whether a warrant would be needed in order to search the premises. Defs. Ex. 2, p. 90. During the conversation, O'Maley told Lt. Smith that if valid consent was given to search the building, no search warrant would be needed. Defs. Ex. 2, pp. 135-136.

After obtaining a standard consent to search form from one of the uniformed officers, Lt. Smith read the contents of the form to Ogletree. Defs. Ex. 2, pp. 114-15; Defs. Ex. 3, p. 59. Ogletree stated that he understood the document and signed the form. Defs. Ex. 2, pp. 114-15; Defs. Ex. 3, p. 60; Defs. Ex. 4. During the search of the office,

Lt. Smith and other officers found several thousand dollars in cash, the Bingo Center's operating records and check books, and a handgun. Defs. Ex. 2, pp. 90-91. In addition, the officers attempted to enter a room located at the rear of the building but found that it was locked. After removing the hinges from the door, police found ten gambling machines inside the room. Defs. Ex. 1, p. 21. Although Ogletree was present while the officers removed the door, he stood by without requesting that the search stop or attempting to withdraw or qualify his written consent to the search. Defs. Ex. 3.

After the door had been removed, Ogletree informed Lt. Smith that the machines belonged to Marc Forman and provided Lt. Smith with a copy of the parties' lease agreement. Defs. Ex. 2, p. 22; Defs. Ex. 5. Vanderpool gave Lt. Smith keys to both the room and the machines and stated that he was working as a volunteer at the Bingo Center under Ogletree's supervision. Defs. Ex. 3, pp. 76-77. After a conversation with O'Maley, Lt. Smith confiscated the currency, gambling machines, and bingo operations records found in the Bingo Center. Defs. Ex. 6, p. 2. Forman himself telephoned Lt. Smith and claimed ownership of the machines later that evening. Defs. Ex. 3, p. 67.

On April 6, 1992, Ogletree presented Lt. Smith with a second bingo permit, bearing the name and address of the New Hope Missionary Baptist Church of Dayton, Ohio. Defs. Ex. 8, p. 1. Lt. Smith traveled to Dayton on April 7, 1992, but found no church located at that address. Defs. Ex. 8, p. 2. He also contacted the Indiana Secretary of State for additional information regarding the permits used by the Bingo Center. Defs. Ex. 8, p. 2. He presented an affidavit containing these findings to the Wayne County Superior Court and obtained a search warrant for the Bingo Center. Defs. Ex. 8. Several officers from the Police Department executed the search warrant on April 8, 1992 and arrested Dix, Ogletree, and another volunteer on charges of professional gambling. Over the next two days, newspapers in Richmond, Muncie, and Dayton reported that the Bingo Center had been searched, that the permit used by the Bingo Center belonged to a nonexistent entity, and that Dix had been arrested on related charges.

Charges were filed against Dix based on his activities at the Bingo Center during the first search on April 3, 1992. Defs. Ex. 10. On September 22, 1992, Lt. Smith filed an Affidavit of Probable Cause and an Information--both prepared by O'Maley--alleging that Dix had committed two class D felonies: Professional Gambling and Theft. Defs. Ex. 10. Dix filed a motion to dismiss the charges and a motion to suppress the evidence taken during the search, but the Wayne County Court denied both motions. Defs. Ex. 11. A jury convicted Dix on both counts on April 21, 1993, and Dix received a 1 ½ year sentence. Defs. Ex. 11. The Indiana Court of Appeals affirmed Dix's conviction on August 30, 1994. Defs. Ex. 12.

On April 20, 1993, police officers made a warrantless arrest of Forman in the hallway of the Wayne County Courthouse. Defs. Ex. 13. Lt. Smith had previously signed an Affidavit of Probable Cause against Forman on June 29, 1992, based on Forman's knowledge and ownership of the machines found during the first search of the Bingo Center. Defs. Ex. 7. This Affidavit was filed with the Wayne County Court on April 30, 1993, and Forman was charged with two counts of Professional Gambling. Defs. Ex. 7. On May 4, 1993, Forman filed a motion to suppress the evidence found in the locked room at the Bingo Center. After a hearing on the matter, the court granted Forman's motion and stated that the officers should have obtained express consent prior to removing the hinges from the door to the back room. Defs. Ex. 19. O'Maley dismissed the case against Forman on August 18, 1993, and stated that "the Court's ruling on the Defendant's Motion to Suppress precludes further prosecution." Defs. Ex. 20. On April 12, 1995, the Indiana Court of Appeals reversed the trial court's decision on the motion to suppress. Indiana v. Foreman, 649 N.E.2d 120 (Ind. Ct. App. 1995). Subsequently, in an Order dated March 18, 1996, the Supreme Court of Indiana reversed the Court of Appeals. Indiana v. Foreman, N.E.2d _, 1996 WL 116206 (Ind.).[1]

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[1] It is significant to remember the legal standards behind the appellate review of this case. The Court of Appeals noted that the state must show the trial court's ruling to be "contrary to law." Forman, 649

The third Plaintiff in the present action, Vanderpool, was also arrested on charges relating to the gambling operations observed on April 3, 1992. During its investigation, the Police Department obtained evidence that Vanderpool had assisted Forman in moving the machines into the building, had supervised the customers' use of the machines, and had paid the customers their winnings. Defs. Ex. 15. On June 29, 1992, Lt. Smith signed an affidavit regarding Vanderpool's involvement with the gambling machines and his assistance with the bingo operations. Defs. Ex. 15. On April 30, 1993, O'Maley filed this affidavit and an information regarding the gambling charges, and the court issued an arrest warrant ten days later. Defs. Exs. 16, 17. Lt. Smith arrested Vanderpool on June 2, 1993. Defs. Ex. 18. O'Maley filed a motion to dismiss the charges on May 9, 1994. Defs. Ex. 22.

N.E.2d at 123. "We will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that of the trial court." Id. Upon review of the evidence, the court determined that all the evidence pointed to the conclusion that Ogletree had common authority over the premises. "Notwithstanding the high standard which the State must overcome on appeal from a negative judgment, we hold, as a matter of law, that the police officers' belief that Ogletree possessed common authority over the room leased to Foreman was reasonable." Id. at 125 (emphasis added).

In reversing the Court of Appeals, Indiana's Supreme Court did not reach conclusions "as a matter of law" regarding the evidence. Instead, the Court simply noted that "the evidence was at least conflicting that the officers reasonably believed that Ogletree had common authority over the leased premises." Forman, 1996 WL116206, at *2. Since conflicting evidence existed, the Supreme Court concluded that the Court of Appeals should have sustained the trial court. Id. at *3 ("[T]here was sufficient evidence that Ogletree did not validly consent to a search of the leased premises to support the trial court's grant of the motion to suppress.").

In the Amended Complaint, the Plaintiffs contend that Lt. Smith and the Police Department violated 42 U.S.C. §§ 1983 and 1985. More specifically, they assert that these Defendants violated their rights under the federal Constitution, the Indiana Constitution, and various other statutory provisions. The Plaintiffs also claim that they were subjected to false arrest and false imprisonment.

On January 31, 1995, the Plaintiffs filed a Motion for Summary Judgment. On February 1, 1995, Lt. Smith and the Police Department also filed a Motion for Summary Judgment. These Motions are now ripe for resolution.

II. SUMMARY JUDGMENT STANDARD

Motions for summary judgment are governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides that a court shall grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When this standard has been met, summary judgment is mandatory. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Shields Enters., Inc. v. First Chicago Corp., 975 F.2d 1290, 1294 (7th Cir. 1992). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Rather, the disputed facts must be outcome determinative. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Schroeder v. Barth, 969 F.2d 421, 423 (7th Cir. 1992). Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. Anderson, 477 U.S. at 248. Irrelevant or unnecessary facts will not preclude summary judgment even when in dispute. Clifton v. Schaefer, 969 F.2d 278, 281 (7th Cir. 1992). Guided by these standards, this Court now considers the motions for summary judgment. For the sake of clarity, this Order shall first discuss each Plaintiffs' § 1983 claims against Lt. Smith and then discuss the § 1983 claims against the Police Department. Next, the § 1985 claims shall be discussed. Finally, this Order shall examine the claims against the John Doe Defendants.

III. THE § 1983 CLAIMS

Under 42 U.S.C. § 1983, a person "who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, or other proper proceeding for redress." To prevail in a § 1983 claim, a plaintiff must show that "(1) the defendant, while acting under color of state law, engaged in specified conduct, and (2) the specified conduct worked to deprive the plaintiff of rights privileges, or immunities secured to [him] by the United States Constitution or other federal law." Blanton v. City of Indianapolis, 830 F. Supp. 1198, 1201 (S.D. Ind. 1993); Brown v. City of Lake Geneva, 919 F.2d 1299, 1301 (7th Cir. 1990).

A. FORMAN'S § 1983 CLAIMS AGAINST LT. SMITH

In the Amended Complaint, Forman raises three separate claims. First, he contends that Lt. Smith violated his constitutional rights by conducting an illegal, warrantless search of the back room of the Bingo Center. Second, he alleges that he was subjected to an unconstitutional warrantless arrest unsupported by probable cause. Third, he alleges that this warrantless arrest represented false arrest and false imprisonment in violation of Indiana law. While these latter two claims do not specifically mention Lt. Smith, Forman has contested Lt. Smith's motions to dismiss these claims against him; therefore, this Court shall examine whether summary resolution of these claims would be appropriate.

1. THE WARRANTLESS SEARCH

In Count I, Forman alleges that Lt. Smith's search of the back room of the Bingo Center violated the Fourth and Fourteenth Amendments to the United States Constitution, as well as Article I,

Section 11 of the Indiana Constitution. In response, Lt. Smith asserts that, even if Forman's constitutional rights have been violated, he is entitled to qualified immunity and may not be held liable for any violation.

Government officials performing discretionary functions possess qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). More specifically, a court must answer "the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." Anderson v. Creighton, 483 U.S. 635, 641 (1987). The Supreme Court has emphasized that courts must examine whether the law was clearly established at the time an action occurred. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he be fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." Harlow, 457 U.S. at 818.

Under these standards, Lt. Smith is entitled to qualified immunity for the search of the locked room at the bingo center if he reasonably believed the search to be lawful based upon clearly established law and the facts he possessed at the time of the search. Certain aspects of Fourth Amendment law must be considered "clearly established" for purposes of the present case. While the Fourth Amendment generally requires the police to obtain a warrant prior to initiating a search, "a search conducted pursuant to a valid consent is constitutionally permissible." Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). The Supreme Court has also indicated that a third party with common authority over the premises may give consent to a warrantless search. United States v. Matlock, 415 U.S. 164, 171 (1974). Moreover, "a warrantless search is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises"--even if that third party does not in fact possess such authority. Illinois v. Rodriguez, 497 U.S. 177, 179 (1990).

According to these precedents, this Court must determine whether Lt. Smith could reasonably have believed that Ogletree possessed common authority over the locked room at the time of the search. The facts indicate that such a belief would have been reasonable. Upon entering the bingo center, Lt. Smith spoke with Ogletree, who identified himself as the operator of the bingo center and the lessor of the premises. Prior to initiating the search, Lt. Smith obtained a consent form and read the contents to Ogletree. Ogletree indicated that he understood the document and signed the form. When the police found the back room to be locked, they did not consult with Ogletree but instead removed the door from its hinges and entered the room, where they discovered the gambling machines. The evidence does not suggest that Ogletree ever attempted to withdraw or qualify his consent to search. [2] Only after the police had discovered the machines did Ogletree inform Lt. Smith that Forman had leased the room.

Based upon Ogletree's identification of himself as lessor of the Bingo Center and Ogletree's signature on the consent form, Lt. Smith could reasonably have believed that Ogletree had consented to a search of the entire Bingo Center. At the very least, Lt. Smith could have reasonably believed that Ogletree had common authority over the entire premises. At the time Lt. Smith conducted this search, it was not clearly established that an officer who has obtained written consent for a search

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The lone evidence the Plaintiffs advance suggesting that Ogletree had not consented to a search of the locked back room comes in an Affidavit submitted by Vanderpool. According to Vanderpool, he heard Ogletree tell Lt. Smith that another party had leased the locked room prior to the removal of the hinges from the door. However, this evidence constitutes hearsay which is not admissible for purposes of the present motion.

must request a key to a locked room on the premises.[3] Therefore, this Court concludes that Lt. Smith could have reasonably believed the warrantless search--including the removal of the door to the locked back room--to be lawful. Accordingly, Lt. Smith possesses qualified immunity and may not be held liable by Forman for any violation of his constitutional rights resulting from the search of the Bingo Center.[4]

2. THE WARRANTLESS ARREST

In Counts II and III, Forman alleges that various officials violated his rights by arresting him. In these Counts, Forman does not specifically mention Lt. Smith; however, Forman has opposed Lt. Smith's efforts to have these Counts dismissed against him. In response to an interrogatory asking if Forman contends that Lt. Smith ordered or participated in his arrest, Forman responded: "Lt. Smith may deny his role as one who either ordered the arrest or participated, but there are sufficient facts to conclude that he, at minimum, knew about it, and at maximum, ordered and/or participated in the same - based on the present information." Defs. Ex. 25.

Even assuming Counts II and III do state claims against Lt. Smith, Forman's claims under these two cannot survive Lt. Smith's

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[3] In fact, the differing opinions of the Indiana Court of Appeals and the Indiana Supreme Court illustrate the constitutional uncertainty regarding this question. That two courts could approach this issue and reach different conclusions suggests that the answer is far from "clearly established."

[4] The Plaintiffs' counsel has argued forcefully that Lt. Smith lacked probable cause to search the bingo parlor or the locked room. However, since Lt. Smith obtained Ogletree's consent prior to initiating the search, the question of probable cause has no relevance to the validity of the search or to the existence of qualified immunity.

Motion for Summary Judgment. As noted by the Seventh Circuit, "'[s]ection 1983 creates a cause of action based upon personal liability and predicated upon fault. An individual cannot be held liable in a § 1983 action unless he caused or participated in an alleged constitutional deprivation.'" Rascon v. Hardiman, 803 F. 2d 269, 273 (7th Cir. 1986) (emphasis omitted) (quoting Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983)); Lile v. Tippecanoe County Jail, 844 P. Supp. 1301, 1308 (N.D. Ind. 1986).

No facts presently before this Court directly establish that Lt. Smith caused or participated in Forman's arrest. According to the evidence, the police arrested Forman in a hallway at the police station, and the facts do show that Lt. Smith was present at the time and place of the arrest. In support of the claim that Lt. Smith may have caused or participated in the arrest, Forman points to four f acts. First, prior to the actual arrest, said "watch this" to another officer; after that, an officer stopped Forman and placed handcuffs on him. Second, after Forman had been led away, Lt. Smith laughed. Third, Lt. Smith participated in the investigation from its outset, discussing various matters with O'Maley. Fourth, the Plaintiffs note a conflict between interrogatory answers of Lt. Smith and O'Maley. According to Lt. Smith, O'Maley directed Officer Branum to make the arrest; however, O'Maley stated that he did not learn about the arrest until after it had occurred.

While these facts do not constitute direct evidence that Lt. Smith caused or participated in the decision to arrest Forman, they may create at least a genuine issue of fact. However, even if Lt. Smith did cause or participate in the arrest, he is entitled to qualified immunity for his action. As previously noted, qualified immunity shields police officers from suit for damages if "a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." Hunter v. Bryant, 502 U.S. 224, 227 (1991); Edwards v. Cabrera, 58 F.3d 290, 292 (7th Cir. 1995). Of course, Lt. Smith would be entitled to qualified immunity if he had probable cause to arrest Forman, meaning that "the facts and circumstances within [his] knowledge . . . were sufficient to warrant a prudent man in believing" that Forman had violated the law. Hunter, 502 U.S. at 228; Edwards, 58 F.3d at 292. A court should determine

whether the police had probable cause based upon the information available to them at the time of the arrest. Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Edwards, 58 F.3d at 292. However, "[e]ven if probable cause was lacking with respect to this arrest, despite [Lt. Smith's] subjective belief that [he] had probable cause, [he is] entitled to qualified immunity as long as [his] belief was objectively reasonable." Edwards, 58 F.3d at 293; Hunter, 502 U.S. at 227.

When the police arrested Forman, they had observed the gambling machines in the back of the Bingo Center. Ogletree informed Lt. Smith that the room had been leased by Forman. Forman himself confirmed that he had an interest in the machines. According to the Probable Cause Affidavit, Forman, in the company of his attorney, presented himself to the Wayne County Prosecutor's Office on April 6, 1992 and "stated that those machines were his and that he placed them there in the Richmond Plaza Bingo Center for profit." Defs. Ex. 7. Based upon these facts, Lt. Smith could have reasonably believed that probable cause existed to arrest Forman. Although O'Maley did determine at a later time that probable cause did not exist, that determination does not impact this Court's inquiry. Lt. Smith's qualified immunity depends upon the known facts and law at the time of the arrest--not upon subsequent legal analyses. This Court concludes, therefore, that Lt. Smith is entitled to qualified immunity from Forman's claims under Counts II and III of the Amended Complaint.[5]

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[5] In addition, Forman has raised a general challenge to Lt. Smith's credibility. In the Memorandum in Support of Summary Judgment and the Response to Lt. Smith's Memorandum in Support of Motion for Summary Judgment, the Plaintiffs' counsel notes certain inconsistencies between Lt. Smith's statements in the various phases of the litigation stemming from the search and subsequent arrests. For example, the briefs note that Lt. Smith referred to "the Muncie FOP charity bingo license" in the Dix Affidavit of Probable Cause; however, in the Forman Affidavit of Probable Cause, Lt. Smith referred to a photocopy of the bingo permit. While a "material misrepresentation in a probable cause affidavit is actionable under § 1983," Pennington v. Hobson, 719

B. DIX'S §1983 CLAIMS AGAINST LT. SMITH

In Counts IV, V, and VI of the Amended Complaint, Dix asserts various claims against Lt. Smith. In Count IV, he challenges his arrest on constitutional grounds; in Count V, he alleges that the arrest represented false arrest or false imprisonment under Indiana law. In Count VI, he claims that Lt. Smith and other unidentified Richmond police officers committed the tort of defamation against him.

1. THE CONSTITUTIONAL CLAIMS

The constitutional claims raised in Count IV of the Amended Complaint lack the focus of Forman's constitutional arguments. It is not entirely clear whether Dix challenges his arrest or the April 8 search of the Bingo center. For purposes of thoroughness, this Court shall assume that Dix challenges both.

Dix first claims that Lt. Smith did not have adequate probable cause to support the issuance of the warrant for the April 8 search. According to the evidence presently before this Court, after closing down the bingo game on April 3, Lt. Smith told Ogletree that the game must remain closed until Ogletree could provide a proper bingo permit. On April 6, Ogletree provided Lt. Smith with a bingo permit issued by the Indiana Secretary of State to the New Hope Missionary Baptist Church ("New Hope Church"). In addition, Ogletree gave Lt. Smith an Affidavit from Robert Gilbert, listed as a trustee of the New Hope Church, stating that Ogletree had been given permission to use that church's permit. Upon receiving this information, Lt. Smith began to investigate whether the New Hope Church was, in fact, a legitimate

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F. Supp. 760, 767 (S.D. Ind. 1989), the Plaintiffs never explain how this or any of the other alleged misrepresentations might be material. Accordingly, these inconsistencies do not impact Lt. Smith's qualified immunity.

entity.[6] After this investigation, Lt. Smith concluded that the church did not meet Indiana's requirements for a bingo permit and obtained a warrant to search the Bingo Center in Richmond.

Dix appears to contend that Lt. Smith could not have had probable cause to support the search of the Bingo Center on April 8, 1992, because he had not conducted a thorough enough investigation of the New Hope Church prior to obtaining the warrant. Specifically, Dix contends that Lt. Smith should have checked the church's status with the Internal Revenue Service and with the Ohio Secretary of State.

This Court does not agree. The Seventh Circuit has noted that "once police officers have discovered sufficient facts to establish probable cause, they have no constitutional obligation to conduct any further investigation in the hopes of uncovering potentially exculpatory evidence." Schertz v. Waupaca County, 875 F.2d 578, 583 (7th Cir. 1989). Based upon the information Lt. Smith uncovered in his

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First, Lt. Smith went to the church's listed address in Dayton, Ohio, where he found the only building with that address was a commercial building containing only a dentist's office and' an accountant's office. Next, Lt. Smith telephoned the Indiana Secretary of State to verify the church's address. Another Richmond police officer, James Branum, traveled to the church's listed address in Dayton and discovered the accountant maintaining an office at that address was Gilbert. Gilbert gave Branum a different address for the church, but Branum did not find the church at that address, either. Gilbert then told Branum that they were sharing a church at a third address; however, Branum found only a vacant lot in this location. Lt. Smith also discovered that the articles of incorporation for the New Hope Church did not list Gilbert as a trustee. Additionally, when Ogletree first informed Lt. Smith that he was the operator of the Bingo Center, he identified himself as a trustee of Elks International Fraternity; however, under Indiana Code § 4-32-3-2, Elks International could not operate a game for another organization.

investigation, he reasonably concluded that the church did not meet Indiana's requirements for a bingo permit; therefore, he determined that the Bingo Center was operating without a valid permit. Because he reasonably believed the bingo game violated Indiana law, he had sufficient probable cause to support the warrant. No constitutional mandate required him to contact the Internal Revenue Service or the Ohio Secretary of State.[7]

Dix also suggests that his warrantless arrest violated constitutional standards. This Court finds no merit in this contention. According to the evidentiary materials, Lt. Smith arrested Dix based on his observations during the initial search of the Bingo Center on April 3. On that evening, Lt. Smith observed Dix counting money and making records regarding the night's bingo operations. This observation created probable cause sufficient to support Dix's warrantless arrest five days later.

Moreover, even if probable cause were found to be lacking for the search warrant or the warrantless arrest, Lt. Smith would still possess qualified immunity for his actions. Based upon the facts and law known to Lt. Smith at the time of these actions, he could reasonably have believed that probable cause existed. Therefore, this Court concludes that probable cause supported the search warrant and the warrantless arrest of Dix and that Lt. Smith possesses qualified immunity for his actions in regard to the search and the arrest.

2. FALSE ARREST AND FALSE IMPRISONMENT

Dix also contends that his arrest and incarceration constituted false arrest and false imprisonment under Indiana law. However, qualified immunity shields police officers from suit for damages if "a

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[7] Interestingly, although Dix contends that Lt. Smith should have contacted these two entities, no evidence in the record presently before this Court reveals what Lt. Smith might have learned through such a continuance of his investigation.

reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." Hunter v. Bryant, 502 U.S. 224, 227 (1991); Edwards v. Cabrera, 58 F.3d 290, 292 (7th Cir. 1995). As noted above, the evidentiary materials presently before this Court establish that probable cause existed to support Dix's arrest. Even if such probable cause did not exist, however, a reasonable officer could have believed that Dix's arrest would be lawful based upon Dix's actions on April 3. Therefore, this Court concludes that probable cause supported Dix's arrest and that Lt. Smith has qualified immunity for his actions in association with this arrest.[8]

3. DEFAMATION

In Count VI, Dix raises a claim for defamation against Smith and various other unidentified officers of the Police Department. Dix alleges that the officers made certain statements to a newspaper or to various newspapers regarding his arrest and that those statements imputed criminal activity to him and caused him harm.

Under Indiana law, the tort of defamation involves four elements: "(1) communication with defamatory imputation; (2) malice; (3) publication; and (4) damages." Schaefer v. Newton, 868 F. Supp. 246, (S.D. Ind. 1994), aff'd, 57 F.3d 1073 (7th Cir. 1995); Schrader v. Eli Lilly & Co., 639 N.E.2d 258, 261 (Ind. 1994), reh. denied. In the present case, Dix's defamation claim cannot withstand Lt. Smith's

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[8] Like Forman, Dix emphasizes that various inconsistencies exist between Lt. Smith's statements in his various testimony. However, Dix fares no better than Forman in explaining how the difference between a bingo license and a photocopy of a bingo license represents a "material misrepresentation." Accordingly, this Court finds no merit to Dix's claim that these inconsistencies defeat Lt. Smith's claim of qualified immunity.

Motion for Summary Judgment since Dix has not identified any defamatory statement. While Dix refers to newspaper articles in the Amended Complaint, he has only included one such article in the evidentiary materials. Exs. Attached to Pls. Resp. to Lt. Smith's Memo. in Supp. of Mot. for Summ. J. (hereinafter "Pls. Resp. Exs."). This article, dated Thursday, May 7, 1992, notes that the Indiana State Police had seized thirty-one gambling machines from seven Richmond area fraternal organizations and one local business the previous afternoon. The article goes on to identify the locations from which the machines had been seized and the value of the machines. The final paragraph of the article states: "On April 4, Richmond Police conducted a similar raid at Richmond Plaza Bingo, 1815 National Road W., and confiscated ten video poker and slot machines. The bingo hall was shut down for operating without a permit."

This article never mentions Dix. Although the Plaintiffs' Brief requests summary judgment on this issue, the Plaintiffs have not provided any evidence suggesting that Lt. Smith or any other Richmond police officer made a defamatory statement about Dix. Therefore, this Court believes that summary resolution of this claim in favor of Lt. Smith is appropriate at this time.

C. VANDERPOOL'S § 1983 CLAIMS AGAINST LT. SMITH

Like the other plaintiffs in this action, Vanderpool raises two separate challenges to his arrest. First, he asserts that the arrest violated various constitutional provisions; second, he contends that the arrest represented false arrest or false imprisonment. These claims may be treated simultaneously.

Unlike Forman and Dix, Vanderpool was arrested by Lt. Smith pursuant to an arrest warrant. On June 29, 1992, Lt. Smith signed an Affidavit of Probable Cause, attributing certain illegal actions to Vanderpool. This Affidavit contains a detailed discussion of the discovery of the gambling machines during the search of the Bingo Center on April 3, the operation of the machines, and Vanderpool's role

in supervising the use of the machines. On April 30, 1993, O'Maley filed this Affidavit of Probable Cause and an Information charging Vanderpool with two counts of professional gambling. On May 10, 1993, the Wayne County Court issued a warrant for Vanderpool's arrest, and Lt. Smith arrested Vanderpool on June 2. On May 9, 1994, however, O'Maley filed a motion to dismiss the charges against Vanderpool.

The subsequent decision to dismiss the gambling charges against Vanderpool does not impact the determination of whether probable cause existed for the initial arrest. Rather, this Court must ascertain whether "the facts and circumstances" within Lt. Smith's knowledge at the time of the arrest "were sufficient to warrant a prudent man in believing" that Vanderpool had violated the law. Hunter, 502 U.S. at 228; Edwards, 58 F.3d at 292. According to Lt. Smith's Affidavit, the investigation suggested that Vanderpool had not only supervised the customers' use of the machines but had also paid the customers their winnings. This evidence suffices to show that Lt. Smith had probable cause to arrest Vanderpool.

However, Vanderpool has also raised a challenge to the veracity of Lt. Smith's affidavit. In doing so, he bears a high burden, for courts award "great deference" to a magistrate's conclusion that a warrant should issue. United States v. Leon, 468 U.S. 897, 914 (1984). However, such deference "is not boundless," and a court may inquire "into the knowing or reckless falsity of the affidavit on which that determination was based." Id. In Franks v. Delaware, 438 U.S. 154, 155-56 (1978), the Supreme Court held:

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's

> false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the warrant must be voided . . . .

In asserting that Lt. Smith "knowingly and intentionally" included false statements in the Affidavit of Probable Cause, Vanderpool points to the same inconsistencies identified by Forman and Dix. Once again, Vanderpool emphasizes that Lt. Smith referred to the bingo license in one Affidavit of Probable Cause and the copy of the bingo license in another Affidavit of Probable Cause. Like the other Plaintiffs, however, Vanderpool fails to attribute any legal significance to this distinction. Vanderpool does not show that Lt. Smith made any misrepresentation "knowingly and intentionally, or with reckless disregard for the truth." Most importantly, however, Vanderpool does not show that the remainder of the Affidavit fails to establish probable cause. Even without any reference to the facts challenged by Vanderpool, it appears likely that the Court would still have issued the arrest warrant. Therefore, Vanderpool's challenge to the Affidavit of Probable Cause fails as a matter of law, and the finding of probable cause remains intact.

Since the Wayne County Court determined that probable cause supported Vanderpool's arrest, Lt. Smith did not violate the constitutional provisions by carrying out that arrest. Moreover, Vanderpool's arrest was neither false arrest nor false imprisonment. This Court also notes that, based upon the facts and law known to him at the time, Lt. Smith would also have possessed qualified immunity for his role in the arrest.

D. THE PLAINTIFF'S §1983 CLAIMS AGAINST THE POLICE DEPARTMENT

The three Plaintiffs have raised the same § 1983 claims against the Police Department that they raised against Lt. Smith. However, these claims against the Police Department cannot survive the present motion for summary judgment. First, it is questionable whether a plaintiff may properly assert a § 1983 claim against a city police

department. "A city's police department is merely a vehicle through which the city government fulfills its policy functions and is not a proper party defendant." Jones v. Bowman, 694 F. Supp. 538, 544 (N.D. Ind. 1988) ; Slay v. Marion County Sheriff's Dept., 603 N.E.2d 877, 887 (Ind. Ct. App. 1992).

Moreover, even if the Plaintiffs may pursue a §1983 action against a city police department, their claims cannot survive the present motion for summary judgment since they have failed to show that they suffered a deprivation of their constitutional rights as a result of some official policy or custom. As recently noted by this Court, to prevail in a § 1983 "against a municipality, a municipal officer in his or her official capacity. . . . or a municipal department or agency," a plaintiff must prove "that the constitutional deprivation was caused by enforcement or exercise of a municipal policy or custom." Blanton, 930 F. Supp. at 1198 (citations omitted). In other words, "a direct causal link" must exist between the "municipal policy or custom and the alleged constitutional deprivation." City of Canton v. Harris, 489 U.S. 378, 385 (1989). Moreover, the plaintiffs must submit evidence suggesting "that the claimed policy or custom actually exists, and that the alleged deprivation resulted from enforcement or pursuit of that policy--i.e., that the deprivation was not an 'isolated' incident." Blanton, 830 F. Supp. at 1202.

In the present case, the Plaintiffs have not shown any constitutional deprivation resulting from an official policy or custom. In responding to the Defendants' Motion for Summary Judgment, the Plaintiffs contend that "liability would flow from the policy and custom established concerning the selective enforcement of the gambling laws of the State of Indiana by the City of Richmond." Pls. Resp. to Lt. Smith's Memo. in Supp. of Mot. for Summ. J. ("Pls. Resp."), pp. 14-15. The Plaintiffs claim that the Police Department possessed information about other gambling in Richmond which was not "subject to the same enforcement efforts/levels." Pls. Resp., p. 15. They charge that the Police Department selectively enforced the gambling laws by prosecuting non-residents while tolerating local gambling. Pls. Resp., p. 15.

The Plaintiffs have offered no evidence to support these assertions. In fact, the Plaintiffs' own evidentiary materials undermine their theory of selective enforcement. According to the newspaper article appended to the Plaintiff's Response, Indiana State Police--assisted by eleven Richmond police officers--seized thirty-one gambling machines from seven Richmond area fraternal organizations and one local business on May 6, 1992. These seizures refute the Plaintiffs' claim that Lt. Smith and the Police Department singled them out for investigation and prosecution; rather, the Plaintiffs' own evidence suggests that the Police Department actively enforced the state's gambling laws and subjected known violators to similar enforcement efforts.

The Plaintiffs have not established that the Police Department pursued an official policy of selective enforcement against nonresidents; therefore, this Court awards summary judgment in favor of the Police Department on the Plaintiffs' § 1983 claims.

IV. THE PLAINTIFF'S § 1985 CLAIMS

The Plaintiffs have also stated claims against Lt. Smith and the Police Department under 42 U.S.C. § 1985; however, these claims also lack sufficient evidentiary support. As this Court recently noted, to prevail in an action under § 1985, a plaintiff must show

> (1)a conspiracy, (2) a purpose of depriving any person or class of persons of equal protection, or equal privileges and immunities, under the laws, (3) an act in furtherance of the conspiracy, (4) a resulting injury to person or property, or a deprivation of rights, and most importantly (5) a racial or otherwise class-based discriminatory animus.

Blanton, 830 F. Supp. at 1203 (citing Quinones v. Szorc, 771 F.2d 289, 291 & n.1 (7th Cir. 1985).

In the present case, the Plaintiffs have provided no evidence as to the fifth necessary element: "racial or otherwise class-based discriminatory animus." The Plaintiffs' Response notes that "the objects of the criminal prosecutions were all associated with the Richmond Plaza Bingo, where Ogletree and Dix were dark skinned/resident(s) of the

State of Ohio, Forman was a non-resident of Delaware County, and Vanderpool was a resident of Wayne County, associated with the Bingo Center." Pls. Resp., p. 17. The differing races of the three Plaintiffs defeats any claim that Lt. Smith or the Police Department discriminated against the Plaintiffs based upon their race. Further, the Plaintiffs have not provided adequate evidence to suggest that they were discriminated against because they were non-residents of Richmond.[9] Therefore, this Court concludes that the Plaintiffs have not made an adequate showing on the fifth required element of a claim under § 1985.[10] Therefore, this Court believes summary judgment may appropriately be awarded in favor of Lt. Smith and the Police Department on the Plaintiffs' § 1985 claims.

V. THE JOHN DOE DEFENDANTS

In addition to the named Defendants, the Plaintiffs have brought claims against fifty John Doe Defendants. According to the Amended Complaint, these Defendants "are police officers with the City of Richmond Police Department in and around April, 1992, and thereafter,

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In discussing the Plaintiffs' §1983 claim against the Police Department, this Court noted that the Plaintiffs submitted a newspaper article which mentioned that Indiana State Police Officers and Richmond Police Officers seized thirty-one gambling machines from seven Richmond area fraternal organizations and one local business on May 6, 1992. This further undermines the Plaintiffs' suggestion that the Police Department and Lt. Smith conspired against them based upon their state or county of residence.

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This Court makes no finding as to whether the Plaintiffs have provided adequate evidence of the remaining four elements of a § 1985 claim.

and other persons whose names and actions are currently unknown to the Plaintiffs' at this time, and the Plaintiffs' will amend the complaint to name the person(s) and their actions when fully ascertained." Amended Complaint, 12. Although the Plaintiffs filed their Amended Complaint on July 5, 1994, these John Doe Defendants still have not been identified.

As noted by the Seventh Circuit, "[a] cause of action under 1983 for an improper arrest or search accrues at the time of the arrest or search." Perez v. Sifel, 57 F.3d 503, 505 (7th Cir. 1995). Moreover, "the two year Indiana statute of limitations for personal injuries (Ind. Code § 34-1-2-2) applies to § 1983 claims." Although a plaintiff may file a complaint against a John Doe Defendant, the plaintiff must identify that defendant within the limitations period; otherwise, any amendment of the complaint to name the individual would not be timely unless the amendment related back or the statute of limitations had been tolled. Worthington v. Wilson, 8 F. 3d 1253, 1255 (7th Cir. 1993); Perri v. Daggy, 776 F. Supp. 1345, 1349 (N.D. Ind. 1991). In the present case, the most recent event challenged by the Plaintiffs is Vanderpool's arrest, which occurred on June 2, 1993. Accordingly, statute of limitations expired--at the latest--in June of 1995. Because the Plaintiffs failed to identify the John Doe Defendants within the applicable two-year period, their claim against these Defendants is time barred.

Also, while the Amended Complaint does mention "other persons whose names and actions are currently unknown," the Amended Complaint only mentions the actions of unidentified police officers. In discussing the Claims against Lt. Smith, this Court noted that government officials possess qualified immunity if "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. The facts and law in the present case supported the search of the Bingo Center and the arrests of Forman, Dix, and Vanderpool. Presumably, any other officers involved in the search or the arrest of these three individuals would receive the same qualified immunity as Lt. Smith.

This Court recognizes that a district judge may grant summary judgment in favor of a party which has not requested it. Hunger v.

Leininger, 15 F.3d 664, 669 (7th Cir.), cert. denied, 115 S.Ct. 123 (1994); Resolution Trust Corp. v. Ruggiero, 994 F.2d 1221, 1226 (7th Cir. 1993). Based upon the expiration of the limitations period and the existence of qualified immunity, this Court believes summary resolution in favor of the John Doe Defendants is appropriate at this time.

CONCLUSION

For the reasons stated above, this Court now GRANTS the Motion for Summary Judgment filed by Lt. Smith and the Police Department on all Counts of the Plaintiffs' Complaint. Also, this Court DENIES the Motion for Summary Judgment filed by the Plaintiffs. Finally, this Court GRANTS Summary Judgment in favor of the unidentified John Doe Defendants.

IT IS SO ORDERED this 1st day of April, 1996.

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

App. "B"

No. 89SOl - 9508 - CR -979

STATE of Indiana,
Appellant,

v.

Marc FOREMAN, a/k/a Marc Forman,
Appellee.

Supreme Court of Indiana.
March 11, 1996.

Defendant was charged with professional gambling and the Wayne Circuit Court, Douglas Van Middlesworth, J., granted defendant's motion to suppress evidence and then granted State's motion to dismiss. State appealed order on motion to suppress. The Court of Appeals, Najam, J., reversed. Transfer was granted. The Supreme Court, Sullivan, J., held that: (1) belief that third party had common authority over leased premises was unreasonable; (2) there was no evidence that third party consented to search of locked room; (3) defendant had subjective expectation of privacy in room; and (4) expectation of privacy was reasonable.

Affirmed.
Opinion, 649 N.E.2d 120, vacated.

Appeal from the Wayne Circuit Court; The Honorable Douglas Van Middlesworth, Judge, Cause No. 89COl-9304-CR-47.

Pamela Carter, Attorney General, Geoff Davis, Deputy Attorney General, Indianapolis, for Appellant.

Thomas D. Margolis, Muncie, for Appellee.

ON PETITION TO TRANSFER

SULLIVAN, Justice.

Facts

Defendant Marc Foreman, a.k.a. Marc Forman, leased a room at the Richmond Plaza Bingo Center in Richmond, Indiana, from Luther Ogletree, the operator and manager of the bingo hall.

On April 3, 1992, after receiving a report that unauthorized bingo games were being conducted at the bingo center, investigator Mark Smith with the Special Unit of the Richmond Police Department went to the bingo center to see if it was operating under a proper gambling permit. Upon his arrival to the bingo center, Smith observed several hundred people playing bingo. Smith also learned that there was no proper permit for the bingo games and subsequently ordered the games to cease.

While Smith was at the bingo center, Ogletree identified himself to Smith as the operator of the bingo center and the leaseholder on and lessor of the premises, and then gave Smith written consent to search the premises. During the search of the premises, Smith and assisting officers encountered a locked door. The officers removed the door from its hinges and entered the room behind the door. Inside the room the officers found ten video gambling machines with stools in front of them. Ogletree told Smith the machines were not his and that he was renting the room to defendant. The door to the room was generally left open during bingo games to allow access to patrons of the bingo hall.

On April 30, 1993, Foreman was charged with two counts of professional gambling, both Class D felonies.[1] In response, Foreman filed a motion to suppress and a motion to dismiss, claiming that

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1 Ind.Code § 35-45-5-3(3) and (6).

Ogletree's consent to search was invalid as to the room leased by him. The trial court granted Foreman's motion to suppress and in doing so stated:

> The argument that the police believed they had valid consent to search the premises would be more persuasive had they asked the presumed consenting party to unlock the door rather than taking the door off its hinges to gain entry....The requirement of a search warrant is intended to protect all from unreasonable searches. The present case highlights the importance of obtaining a warrant when possible. In the present case, first hand information concerning the activities, in the subject room was obtainable with a minimal police investigation. The police already suspected illegal gaming in the room, having received several tips. There were numerous customers and workers at the Bingo Plaza that had access to the room and were familiar with the activities therein. An undercover agent could have obtained access with little apparent difficulty. The prudent steps of obtaining a warrant would have prevented the illegal search problem.

Thereafter, the State filed a motion to dismiss, which the trial court later granted. The State then appealed the trial court's granting of Foreman's motion to suppress, claiming that the search was valid. The Court of Appeals agreed and reversed the trial court. Indiana v. Foreman, 649 N.E.2d 120, 125 (Ind.Ct.App.1995). Judge Baker dissented and agreed with the trial court that valid consent had not been obtained in this case and that therefore a warrant was necessary. Id. Foreman seeks review of the Court of Appeals decision and we granted transfer on August 17, 1995.

Discussion

Foreman maintains that the trial court was correct in granting his motion to suppress, because the State's warrantless search of the room he leased at the bingo center constituted a violation of his Fourth

Amendment rights.[2] The State asserts, and the Court of Appeals agreed, that there was no Fourth Amendment violation since the police conducted the search with the consent of Ogletree, whom the police reasonably believed to have authority over the premises searched.

Under the Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, all searches of private property must be reasonable. U.S. Const. amend. IV; Fair v. State, 627 N.E.2d 427, 430 (Ind.1993). "A warrantless search is presumed to be unreasonable, and the State bears the burden to show that the search falls under an exception to the warrant requirement." Smith v. State, 565 N.E.2d 1059, 1060 (Ind.1991) (citing Brooks v. State, 497 N.E.2d 210 (Ind.1986)). The validity of a warrantless search turns upon the facts of each case. Savage v. State, 523 N.E.2d 758, 760 (Ind. 1988).

As the Court of Appeals correctly pointed out, "a valid consent to search obviates the necessity of a warrant." 649 N.E.2d at 123 (citing Stallings v. State, 508 N.E.2d 550, 552 (Ind.1987)). Consent to search may be granted by a third party who has common control over the premises searched. United States v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974). To establish common authority, the State must show that the third party had joint access or control over the premises. Id. at 171 n. 7, 94 S.Ct. at 993 n. 7.

In this case, the Court of Appeals declined to determine whether or not Ogletree had common authority over the leased premises, because even where a third party does not actually have common control over the premises, if the police at the time of the entry reasonably believed that

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The Fourth Amendment to the U.S. Constitution reads, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

the third party had common control over the premises, the warrantless entry may be valid. Illinois v. Rodriguez, 497 U.S. 177, 179, 110 S.Ct. 2793, 2796-2797, 111 L.Ed.2d 148 (1990). The Court of Appeals applied the Rodriguez analysis to the facts of this case and concluded that the police officers reasonably believed that Ogletree had common authority over the leased premises. In so concluding, the Court of Appeals relied on the facts that Ogletree informed the police that he was the operator of the bingo game and the leaseholder on the premises, that Ogletree gave permission to search the Richmond Plaza Bingo Hall, and that the officers did not find out that Foreman leased the room until after the search was conducted. 649 N.E.2d at 125.

We do not find the Court of Appeal's analysis convincing for several reasons. First, in light of the fact that the police officers took the door off of its hinges to gain access to the room instead of merely asking Ogletree to unlock the door, the evidence is at least conflicting that the officers reasonably believed that Ogletree had common authority over the leased premises. Second, and more importantly, we believe that even if the officers had reasonably believed that Ogletree had common authority over the leased premises, we find no evidence that Ogletree consented to the search of the locked room. It is irrelevant whether or not the officers thought Ogletree had common authority over the leased premises if it is not first clear that he actually consented to a search of the leased premises. Rodriguez, 497 U.S. at 177, 110 S.Ct. at 2795 (third party clearly consented to search first). As the trial court said, "The argument that the police believed they had valid consent to search the premises would be more persuasive had they asked the presumed consenting party to unlock the door rather than taking the door off its hinges to gain entry." (emphasis added).

We agree with the trial court that had the police reasonably believed that Ogletree gave permission to search the room, the police simply would have asked Ogletree to unlock the door. Instead, the police took the door off its hinges to gain access to the room. We acknowledge that Ogletree had signed a written consent permitting a search of the Richmond Plaza Bingo Hall, without any explicit exclusion of the locked room. However, we cannot reconcile that fact with the inconsistent behavior of the police in removing the door off the hinges when Ogletree

was standing right there and could have easily provided a key to unlock the door. We conclude there was sufficient evidence that Ogletree did not validly consent to a search of the leased premises to support the trial court's grant of the motion to suppress.[3]

"[A] Fourth Amendment violation must establish (i) that the defendant had an actual or subjective expectation of privacy and (ii) that the claimed expectation must be one which society recognizes as reasonable." Blalock v. State, 483 N.E.2d 439, 441 (Ind. 1985) (citing Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979) and Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). This two prong test was initially espoused in Justice Harlan's well known concurrence in Katz and has come to play a vital role in Fourth Amendment jurisprudence.

A

The first prong of the test requires a determination that the defendant held an actual, subjective expectation of privacy in the area searched. Katz, 389 U.S. at 361, 88 S.Ct. at 516-17. In making this determination, courts have historically looked to the steps that the defendant took to preserve his or her privacy. See California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) (A ten foot fence placed by the defendant around his yard was evidence that he took precautions to maintain his privacy, at least with respect to street level viewers.); United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (By taking steps to place his personal effects in a locked footlocker, the defendant manifested an expectation of privacy.); Katz, 389 U.S. at 351-52, 88 S.Ct. at 511 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of

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The State also argues that even if valid consent was not given, the defendant did not have a legitimate expectation of privacy in the area searched and that therefore the search did not violate the defendant's Fourth Amendment rights.

the Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.") (emphasis added); and United States v. Burnett, 890 F.2d 1233, 1239 (D.C.Cir.1989) (In determining that defendant did not have a reasonable expectation of privacy, court focused on steps not taken to preserve privacy. "Had Burnett's subjective expectation of privacy been more pronounced, he would, presumably, have closed the door to the bedroom in which he was staying...." (emphasis added).

The State argues that the defendant took no precautions to maintain privacy because the room he leased was open to the public. Although it is true that the room was open to the general public during business hours, at the time that the officers encountered it, the room was no longer open to the public. Sometime before encountering the locked door, the police had ordered the games to cease, which thereafter effectively closed the center. One of the employees had then closed and locked the door to the leased room, cutting off access at that point to the general public.

In this, case, we acknowledge that had the officers entered the room while the door was open and the rest of the public had access, the defendant likely would not have had an expectation of privacy at that time. See Maryland v. Macon, 472 U.S. 463, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985) (There is no reasonable expectation of privacy in an area that is open to the public.) But that is not what happened here--as demonstrated by the fact that the police could only gain access by removing the doors from its hinges while it was closed and locked.

Furthermore, it has been held that in order to claim a defendant did not have an expectation of privacy in premises that were open to the public, the officers must have viewed incriminating evidence as regular customers would. "[G]overnment agents cannot attempt to justify a warrantless search on a claim of reduced expectation of privacy on business premises when the agents do not see the items as a customer would ordinarily see them." United States v. Swart, 679 F.2d 698, 701 (7th Cir.1982) (citing Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920 (1979)). Since the officers had to

remove the door from its hinges, it is clear that the officers did not enter the premises as regular customers during business hours would.

In addition, we agree with the Court of Appeals that the mere fact that Ogletree and a few other entrusted persons had a key to the premises did not negate defendant's reasonable expectation of privacy.[4] The fact that other employees or entrusted people have a key to one's office does not defeat that person's expectation of privacy in his or her commercial premises. United States v. Taketa, 923 F.2d 665, 673 (9th Cir.1991) ("[A]llowing the existence of a master key to overcome the expectation of privacy would defeat the legitimate privacy interest of any hotel, office, or apartment complex....Privacy does not require solitude.").

When the doors were closed and locked and access to the general public cut off, a measure was taken to maintain privacy with respect to that room. In light of this effort, we believe the defendant had a subjective expectation of privacy at least during the times that the door was closed and locked and general public access denied.

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This does not end our inquiry, however, as we must further determine whether Foreman's expectation of privacy in this case is one that society would recognize as reasonable. Katz, 389 U.S. at 361, 88 S.Ct. at 516-17.

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[4] Given the Court of Appeals' disposition of this case, it found it unnecessary to decide whether Foreman had a reasonable expectation of privacy in the locked room. The Court of Appeals did observe, however, that it agreed with the trial court that lessor's mere limited right to enter the room and possession of a key do not overcome the defendant's expectation of privacy in the leased room. 649 N.E.2d at 124 n. 3.

Although the expectation of privacy with regard to commercial premises is less than the expectation of privacy with regard to private homes, New York v. Burger, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987),[5] the United States Supreme Court has established that the Fourth Amendment prohibition against unreasonable searches does apply to commercial businesses. Marshall v. Barlow's, Inc., 436 U.S. 307, 311, 98 S.Ct.1816, 1819-20, 56 L.Ed.2d 305 (1978)("The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that amendment, and the importance of the American colonial experience.") As we discussed in part II-A, supra, an expectation of privacy in business premises while general public access is available is not likely to be considered reasonable, at least as long as the officers view items as ordinary customers would. See Macon, 472 U.S. 463, 105 S.Ct. 2778, and Swart, 679 F.2d 698. However, in a case such as this one, where the general public no longer had access to the room and the door was closed and locked, we believe society would recognize defendant's expectation of privacy as reasonable. Simply because one allows general access to a facility during certain times, does not mean that person has forgone any expectation of privacy with respect to that facility during times he or she wishes to exclude others. In fact, we are hard pressed to think of a situation where our society would be more likely to recognize that a commercial establishment's expectation of privacy is reasonable than when the doors have been closed and locked and business hours are over. Finally, we believe this conclusion is consistent with the United States Supreme Court's recognition of what it called "our society's historical understanding that owners of such [commercial] property have a legitimate interest in being free from unnecessary government inspections." Marshall, 436 U.S. at 311-313, 98 S.Ct. at 1819-1821.

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"An expectation of privacy in commercial premises ... is less than a similar expectation in an individual's home." Burger, 482 U.S. at 699, 107 S.Ct. at 2642 (citing Donovan v. Dewey, 452 U.S. 594, 598-99, 101 S.Ct. 2534, 2538, 69 L.Ed.2d 262 (1981)).

Conclusion

Because the defendant had a reasonable expectation of privacy in the leased room, there was no valid consent to search the premises, and no other valid exception to the warrant requirement was claimed, the warrantless search of the leased premises was unconstitutional and the trial court's motion to suppress was appropriate.

Therefore, we vacate the decision of the Court of Appeals and affirm the trial court's grant of defendant Foreman's motion to suppress.

SHEPARD, C.J., and DEBRULER, DICKSON and SELBY, JJ., concur.

App. "C"

Amendment IV
United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

App. "D"

Amendment XIV
United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice president of the United States, Representatives in Congress, the Executive or Judicial officers of a State, or the members of Legislatures thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or representative of Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions or

bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid or insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

App. "E"

42 U.S.C. § 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.